APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-10885

[Filed February 11, 2008]

MANUEL GALLEGOS	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION	)
	)
Respondent-Appellee	)

Appeal from the United States District Court
for the Northern District of Texas
USDC NO. 3:05-CV-00029

Before WIENER, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

Appellant Manuel Gallegos (Gallegos) appeals the district court's denial of his petition for habeas corpus relief filed under 28 U.S.C. § 2254. Specifically, Gallegos challenges the district court's denial of his request for an evidentiary hearing and his ineffective assistance of counsel claim. Because the district court did not abuse its discretion by not holding an evidentiary hearing and because it properly concluded that Gallegos failed to establish that he received ineffective assistance of counsel, we affirm.

I. BACKGROUND

On July 21, 2000, Gallegos was involved in an altercation with Alfredo "Little Freddy" Lopez (Lopez) and Jesse Hernandez (Hernandez). Hernandez testified at trial that following a verbal exchange with Gallegos, Lopez took off running while Hernandez stayed behind to face Gallegos. Gallegos approached Hernandez and stated that he was only interested in Lopez. Gallegos fired a shot into the air and Hernandez ran. While he was running Hernandez heard a second shot but did not see who fired it. Hernandez returned to the area where the shots were fired and found Lopez lying on the ground, apparently dead, shot once in the back. Albert Ayala (Ayala) was on his front porch across the street from where Lopez was shot. Ayala testified that he heard the first shot

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. 47.5.4.

and saw Hernandez and Lopez running. Ayala also saw the muzzle blast from the second shot, and immediately lay on the ground. When he looked up, he saw Lopez lying on the street and Gallegos walking away. Later that evening, Gallegos was stopped by police, who found a pistol in the truck in which he was traveling. Investigators found one .40 caliber casing that was fired from the pistol in the area where the shots were fired. Police conducted a handwiping test on possible suspects and only Gallegos tested positive for recently firing a gun. After his arrest, Gallegos admitted in a written statement to the police that he fired two shots, one in the air and one in the direction of Lopez. However, he maintained that neither shot hit Lopez and that Lopez continued running after both shots were fired.

On April 16, 2001, a Texas state court jury found Gallegos guilty of first-degree murder. The court sentenced Gallegos to fifty years in prison. After Gallegos exhausted his direct appeals, he filed a state habeas corpus application alleging, *inter alia*, ineffective assistance of counsel at trial. Specifically, Gallegos alleged that his trial counsel was ineffective for failing to present any forensic evidence at trial. Gallegos believed that forensic evidence would have shown that Lopez was shot while he lay on the ground and not while he was running as Ayala had testified. Gallegos also requested an evidentiary hearing.

The state habeas court did not hold an evidentiary hearing but did request two affidavits from Gallegos's trial counsel, Anthony Calisi (Calisi). The affidavits stated that: (1) Calisi's decisions "were well thought out and appropriately implemented"; (2) Gallegos was

provided with "effective assistance of counsel"; (3) he hired a "forensic scientist"; (4) he obtained Lopez's clothing for the forensic scientist to study; and (5) he "visit[ed] with the Medical Examiner at her office." Calisi also stated that he ultimately presented only those witnesses he believed to be credible: "In that regard, it was quite difficult to present witnesses for the defense . . . ." The state habeas court also considered the affidavit of Raul Guajardo (Guajardo), submitted by Gallegos. Guajardo, a forensic scientist, stated his belief that the evidence, which he had examined after the trial at Gallegos's request, showed that Lopez was struck while he was either "falling and close to the ground" or was "in a prone position and on the ground." This conclusion contradicted Ayala's eye-witness testimony that Lopez was running when the fatal shot was fired. The state habeas court found Calisi's affidavits to be "true, correct, and dispositive" of Gallegos's ineffective assistance of counsel claims, and thus recommended denial of Gallegos's habeas application. On October 20, 2004, the State Court of Criminal Appeals denied his habeas application without a written order.

On January 5, 2005, Gallegos filed a § 2254 petition with the federal district court, raising the same issues as he did in his state habeas claim and again requesting an evidentiary hearing. The magistrate judge issued its "findings, conclusions and recommendations," concluding that the state court's decision was not an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2). The magistrate judge also concluded that Calisi's affidavits implied that a forensic scientist

had been hired but was not called as a witness because his testimony ultimately would not have aided Gallegos's defense at trial. On June 21, 2007, the district court adopted the magistrate judge's findings and denied Gallegos's § 2254 application. Gallegos timely filed a notice of appeal and request for a Certificate of Appealability (COA), which was denied by the district court. The Fifth Circuit granted Gallegos a COA on the issue of whether his trial counsel was ineffective for failing to obtain and present forensic evidence. *Gallegos v. Quarterman*, No. 05-10885, slip op. at 2 (5th Cir. Aug. 10, 2006) (unpublished).

On appeal, Gallegos contends that Ayala was the star witness against him at trial, and that his trial counsel's failure to present forensic evidence to rebut Ayala's testimony prejudiced him. Gallegos also asserts that the state habeas court relied on Calisi's "vague" affidavits rather than conduct an evidentiary hearing, which resulted in a decision that was an unreasonable determination of the facts in light of the evidence presented. Finally, Gallegos asserts that he was entitled to an evidentiary hearing in the district court because the state habeas court improperly denied his request for a hearing, which would have allowed him to develop the factual basis of his claim.

II. ANALYSIS

A. Standard of review

Gallegos filed his habeas petition in district court on January 5, 2005, after the effective date of the Anti-Terrorism and Effective Death Penalty Act of

1996 (AEDPA). We therefore review his appeal pursuant to AEDPA. *See* 28 U.S.C. § 2253; *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). AEDPA provides in relevant part that:

> [a]n application for a writ of habeas corpus. . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Federal habeas relief is only available when the state court's decision was incorrect and objectively unreasonable. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). Further, state court findings of fact are presumed correct unless the defendant rebuts this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

B. Denial of evidentiary hearing

Before we address whether Gallegos received ineffective assistance of counsel, we consider Gallegos's assertion that the district court erred by not holding an evidentiary hearing on his ineffective assistance of counsel claim. We review a district court's denial of a request to hold an evidentiary hearing for abuse of discretion. *Clark v. Johnson*, 202 F.3d 760, 765 (5th Cir. 2000).

A petitioner must develop the factual basis of his claim in state court to be entitled to an evidentiary

hearing in federal court. 28 U.S.C. § 2254(e)(2). However, a petitioner who has not developed the factual basis of his claim may still be granted an evidentiary hearing if one of the two conditions set forth in § 2254(e)(2) is met.[1] *Id.* § 2254(e)(2)(A),(B). "'Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.'" *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 420, 432 (2000)).

Assuming without deciding that Gallegos's request for an evidentiary hearing is not barred by the preclusive effect of § 2254(e)(2), we find that the district court did not abuse its discretion in denying Gallegos an evidentiary hearing. "[O]vercoming the preclusive effect of § 2254(e)(2) does not *guarantee* an evidentiary hearing, it only opens the door for one." *Clark*, 202 F.3d at 765. The district court still has the discretion to grant or deny an evidentiary hearing. *Id.* There is no requirement for a federal habeas court to conduct a hearing with live testimony. *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). When

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[1] First, the petitioner's claim must rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," or on a "factual predicate that could not have been previously discovered through the exercise of due diligence." *Id.* § 2254(e)(2)(A). Alternatively, the applicant must show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2254(e)(2)(B).

"[t]he district court ha[s] sufficient facts before it to make an informed decision on the merits of [the habeas petitioner's] claim" it does not abuse its discretion in failing to conduct an evidentiary hearing, even where no factual findings are explicitly made by any state court. *See id.*

Furthermore, the lack of an evidentiary hearing in state court does not effect the presumption that the state court findings of fact are correct. *See* 28 U.S.C. § 2254(e)(1); *see also Valdez v. Cockrell*, 274 F.3d 941, 950-51 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002). In contrast to the pre-AEDPA law, deference to a state habeas court's factual determinations is not dependent upon the quality of the state court's evidentiary hearing. *Valdez*, 274 F.3d at 950. "[A] full and fair hearing is not a precondition to according § 2254(e)(1)'s presumption of correctness to state habeas court findings of fact nor to applying § 2254(d)'s standards of review." *Id.* at 951.

Gallegos argues that an evidentiary hearing would have allowed him to present evidence to establish his claim for ineffective assistance of counsel. However, when requesting an evidentiary hearing, Gallegos offered only Guajardo's affidavit for support. Guajardo's affidavit essentially calls into question Gallegos's liability for the shooting; it does not raise an issue as to whether Calisi provided ineffective assistance of counsel at trial. Thus, Gallegos's primary argument for ineffective assistance of counsel is that Calisi either lied in his affidavits or that the affidavits lacked enough specificity for Gallegos to determine whether Calisi developed an effective forensic defense strategy. Gallegos has not presented any evidence to

support his claim, relying instead on unsubstantiated attacks on Calisi's affidavits. The state habeas court found that Calisi's affidavits were correct and dispositive of Gallegos's ineffective assistance of counsel claims. Calisi's affidavits make clear that he hired a forensic scientist, obtained evidence for the forensic scientist to examine, and discussed Gallegos's case with the Medical Examiner. Both the state habeas court and the federal district court determined that a hearing was unnecessary and a decision could be rendered based on the affidavits before the court. We find no error with the federal district court's decision. Gallegos has failed to marshal clear and convincing evidence to rebut the presumption of correctness afforded the state court's findings of fact. The district court did not improperly rely on the state habeas court's factual findings or improperly infer from the affidavits that the expert was not called at trial because his testimony would not have aided Gallegos. When a state court's rulings are vague, its implied factual findings and legal rulings are still entitled to deference. *See, e.g., Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004) (implicit factual findings are entitled to deference); *Santellan v. Cockrell*, 271 F.3d 190, 193-94 (5th Cir. 2001) (ultimate ruling of state court entitled to deference even if no explanation for ruling is given). Because we conclude that the district court did not abuse its discretion by not holding an evidentiary hearing, we turn to Gallegos's ineffective assistance of counsel claim.

C. Ineffective assistance of counsel

We review the district court's findings of fact for clear error and issues of law *de novo* when reviewing the denial of habeas relief. *Moody v. Johnson*, 139 F.3d 477, 480 (5th Cir. 1998).

To establish his claim for ineffective assistance of counsel, Gallegos must show (1) that his counsel was deficient and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court applies an objective standard of reasonableness, as measured by professional norms, to determine whether counsel's performance was deficient. *Id.* To prove deficiency, Gallegos must show that his trial counsel was not functioning as the "counsel" guaranteed him by the Sixth Amendment. *Id.* Our scrutiny of counsel's performance is "highly deferential" and there is a "strong presumption" that any alleged deficiency "falls within the wide range of reasonable professional assistance." *Id. at* 689. To demonstrate prejudice, Gallegos "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* A failure to establish either deficiency or prejudice defeats the claim. *Id.* at 697.

Calisi's affidavit states that he hired a forensic expert and obtained evidence for the expert to analyze, indicating that he did some forensic investigation of Gallegos's case. Gallegos has not overcome the presumption we afford Calisi's trial strategy and

decision not to call the forensic expert to the stand at trial. *See, e.g.*, *Williams v. Cain*, 125 F.3d 269, 278-79 (5th Cir. 1997) ("[F]ailure to present . . . evidence would not constitute 'deficient' performance within the meaning of *Strickland* if [counsel] could have concluded, for tactical reasons, that attempting to present such evidence would be unwise."). Gallegos failed to establish that his trial counsel was deficient in his representation at trial.

Furthermore, Gallegos has failed to show a reasonable probability that but for his trial counsel's failure to call a forensic expert he would have been found not guilty of fatally shooting Lopez. Although Guajardo's affidavit calls into question the path of the bullet in relation to the position of Lopez's body when he was shot, testimony from the Medical Examiner at trial indicated that the path of a bullet could be influenced by a number of factors, including the victim's body movement, the shooter's movement, and whether the bullet struck a bone or an organ. Gallegos also admitted to shooting in Lopez's direction, was found with a pistol in his brother's truck, and tested positive for firing a gun the night of the shooting. Finally, there was eye-witness testimony from Ayala who saw the second shot being fired and moments later saw Lopez lying in the street as Gallegos walked away.

Because Gallegos has failed to establish his claim for ineffective assistance of counsel, we affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CA-3:05-CV-0029-H

[Filed June 21, 2005]

MANUEL GALLEGOS Petitioner	)
v.	)
DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE Respondent	)

ORDER

Before the Court are the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed June 13, 2005, and Petitioner's Objection thereto, filed June 20, 2005.

The Court has made the required independent review of the pleadings, files, and records in this case; the Findings and Conclusions of the Magistrate Judge and Petitioner's Objections. Having done so, the Court

is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are **ADOPTED** as the Findings and Conclusions of the Court, and Petitioner's Objections are **OVERRULED**.

Judgment will be entered accordingly.

SO ORDERED.

DATED: June 21st, 2005

/s/
BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

No. 3:05-CV-0029-H

[Filed June 21, 2005]

MANUEL GALLEGOS	)
	)
v.	)
	)
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice Correctional Institutions Division	)

JUDGMENT

The Court has entered its Order Adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case.

It is therefore ORDERED, ADJUDGED AND DECREED that the petition is denied and dismissed.

Signed this 21st, day of June, 2005.

/s/
BAREFOOT SANDERS
SENIOR JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3:05-CV-0029-H

[Filed June 13, 2005]

MANUEL GALLEGOS Petitioner	)
v.	)
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent	)

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and the District Court's order in implementation thereof, the subject cause has been referred to the undersigned United States Magistrate Judge. The findings, conclusions, and recommendations of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner Manuel Gallegos ("Gallegos" or "Petitioner") is confined at the Ferguson Unit of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID) at Midway, Texas. Respondent is the Director of TDCJ-CID.

Statement of the Case: Gallegos was charged with first degree murder and entered a plea of not guilty in cause number F00-51576-U. The jury found him guilty and sentenced him to a term of fifty years in the penitentiary.

Petitioner effected a direct appeal and on May 6, 2002 the Court of Appeals affirmed his conviction. *Gallegos v. State,* 76 S.W.3d 224 (Tex.App. - Dallas 2002, pet. ref'd). Gallegos filed a motion for rehearing which was overruled by the Court of Appeals on June 17, 2002. On October 30, 2002, the Court of Criminal Appeals refused his petition for discretionary review.

Gallegos filed an application for habeas corpus relief pursuant to Tex. Code Crim. Proc. art. 11.07 on September 17, 2003. *Ex. Parte Gallegos,* Appl. No. 58,719-01. The Texas Court of Criminal Appeals denied Petitioner's application without written order the findings of the trial without a hearing on October 20, 2004. *See id.* at cover.

In response to Gallegos's petition and this court's show cause order Respondent filed an answer together with copies of Petitioner's prior state proceedings on March 21, 2005. Gallegos did not file a traverse.

Findings and Conclusions: Review of Petitioner's claims is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which in pertinent part provides that a federal court cannot grant relief under § 2254 unless the adjudication of the state prisoner's claim in the state court system "resulted in a decision that involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." § 2254(d)(1) & (2). Further, findings of fact made by a State court are presumed to be correct absent clear and convincing evidence rebutting the presumption. § 2254(e)(1).

In his first ground for relief, Petitioner contends that his trial attorneys were ineffective because they failed to call as witnesses Aldriana Valdez, Jesse Hernandez, and Vito Valdez; failed to present expert testimony; and failed to call Gallegos as a witness.

An attorney's conduct is governed by the standards set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). There is a strong presumption that an attorney's conduct falls within the broad range of reasonable professional assistance required under the Sixth Amendment. *Id.* at 690, 104 S.Ct at 2065. To overcome this presumption a habeas petitioner must

establish that the attorney's conduct was constitutionally deficient (cause) and that but for such unprofessional errors the result probably would have been different (prejudice). Failure to prove either prong of the two part test forecloses relief. *Id* at 694, 104 S.Ct. at 2068.

In order to establish a basis for relief predicated on a failure to call witnesses a petitioner is required to show that their testimony would have been favorable and also that they would have testified at trial. *See, e.g., Boyd* v. *Estelle,* 661 F.2d 388, 390 (5th Cir. 1981). As a general rule such "complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." *United States v. Cockrell,* 720 F.2d 1423, 1427 (5th Cir. 1983) *cert. denied* 467 U.S. 1251, 104 S.Ct. 3534 (1984), citing *Buckelew v. United States,* 575 F.2d 515, 521 (5th Cir. 1978).

Petitioner cannot show prejudice because he did not present affidavits of uncalled witnesses showing their competence, the testimony they would have given, and that they were available to testify on the day in question. *See, e.g., Alexander* v. *McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). Petitioner has included numerous affidavits in support of this ground, but none meet those required by *Alexander.* He first includes the affidavit of Jay Williams, a private investigator, as to the verison of the facts told to him by Ms. Valdez. (Mem. in Supp. of Pet. for Writ of Habeas Corpus Exh. H). He next includes the affidavit of Ray Whitley, another private investigator, who

attached a transcript of a tape recording of an interview he had had with Mr. Hernandez. (*Id.* at Exh. I). He also included a memo of a prior conversation with Mr. Valdez. *(Id.).* However, these affidavits at most amount to hearsay as to what the witnesses might have said. In addition, none of these affidavits show that any of the potential witnesses would have been available to testify on the day in question.[1]

As has been made clear in numerous decisions of the United States Supreme Court interpreting the provisions of the AEDPA, *see, e.g., Yarborough v. Gentry,* 540 U.S. 1, 5, 124 S.Ct. 1, 4 (2003), before a federal court may grant habeas corpus relief it must be shown that the State court decision was not only erroneous, but also objectively unreasonable. The Texas trial court and therefore the Texas Court of Criminal Appeals found that Gallegos's counsel's affidavit was true and correct. *Ex Parte Gallegos* at 121, cover. Petitioner's counsel stated in his affidavit that he hired a forensic scientist. Although he does not explicitly state that this is so, the implication is that the information provided by the forensic scientist would not have aided Gallegos at trial. *Id.* at 123-24. Petitioner has not shown a "reasonable probability" that, but for the introduction of his own forensic expert, "the jury would have had a reasonable doubt concerning his guilt." *Evans v. Cockrell,* 285 F.3d 370, 377 (5th Cir. 2002)(quoting *Earhart v. Johnson,* 132

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[1] Ms. Valdez, for instance, refused to sign an affidavit as to the facts she told the private investigator and stated that she did not want to be involved in Petitioner's case. (Mem. in Supp. of Pet. for Writ of Habeas Corpus Exh. H).

F.3d 1062, 1068 (5th Cir. 1998)). Therefore the decision of the Texas Court of Criminal Appeals was not objectively unreasonable.

Finally, in regards to his own testimony, Petitioner asserts that he would have testified that he did not kill the victim and that he did not chase him down as testified to by Mr. Ayala. As noted *infra,* Petitioner's attorney stated in his affidavit found credible by the Texas Court of Criminal Appeals that Petitioner made the voluntary choice not to testify. In addition, Petitioner cannot show that his failure to testify prejudiced him. During the State's presentation of its case, Gallegos's statement given the morning after the offense was read to the jury. (Reporter's Record v.3 at 48-50). This statement contained the same information that Petitioner asserts that his testimony would have. *(Id.).* In addition, Gallegos's counsel believed that his testimony could open the door to further damaging information. *See Ex Parte Gallegos* at 124. Therefore, Petitioner cannot meet the prejudice prong of the *Strickland* test either. *See United States v. Harris*, __ F.3d __, 2005 WL 958219 *4 (5th Cir. Apr. 27, 2005).

In his second ground for relief, Petitioner complains that his attorneys denied him the right to take the stand at his trial. Gallegos's attorney stated in his affidavit that it was explained to Petitioner in both English and Spanish that his counsel did not recommend that he take the stand, and that Petitioner acquiesced in this decision. *Ex Parte Gallegos* at 124. By finding this account credible and dispositive of the issues raised as regarded Gallegos's ineffective assistance of counsel claim, the Texas Court of Criminal Appeals implicitly found this statement true.

See id. at 121, cover. Petitioner has not overcome the presumption of correctness which attaches to state court findings of fact in a federal habeas proceeding. *See* § 2254(e)(1).

In his third ground for relief, Gallegos asserts that he is actually innocent. Petitioner acknowledges that this court is bound by the decisions of the Fifth Circuit, which has held on numerous occasions that a claim of actual innocence is not cognizable on habeas review. *See, e.g., Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999), *cert. denied* 529 U.S. 1097, 120 S.Ct. 183 (2000). Petitioner contends that this court should look to the decisions in *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993) and *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995) rather than to Fifth Circuit precedent. However, in light of the fact that the Fifth Circuit obviously considered the above cases in rejecting actual innocence as a cognizable claim on habeas review, this court should decline to reject the clear directive of the Fifth Circuit.

RECOMMENDATION:

Petitioner has failed to show that he is entitled to relief pursuant to 28 U.S.C. §2254. Specifically, he has failed to establish that the decision of the Texas Court of Criminal Appeals constituted a decision which met the prerequisites of §2254(d)(1) or (2). It is therefore recommended that the petition be denied and dismissed.

A copy of this recommendation shall be transmitted to counsel for Petitioner and to counsel for Respondent.

SIGNED this 13th day of June, 2005.

/s/
Wm. F. Sanderson Jr.
United States Magistrate Judge

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996)(*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX D

CONSTITUTIONAL AMENDMENTS AND STATUTES

United States Constitution Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment

of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S) (June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996; Pub.L. 104-132, Title I, § 104, 110 Stat. 1218.)

APPENDIX E

WRIT NO. W00-51576-U(A)
INDICTMENT NO. F00-51576-U

291st JUDICIAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

[Dated January 13, 2004]

STATE OF TEXAS)
)
COUNTY OF DALLAS)
)

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Anthony Paul Calisi, who, after being my be duly sworn, upon oath states:

"My name is Anthony Paul Calisi, an attorney duly licensed to practice law in the state of Texas on April 20, 2001 and through this day. I was retained to represent Applicant, Manuel Gallegos, in the murder case from which this writ is derived.

My associate, Mr. Hugo Aguilar, an attorney also duly licensed to practice law on April 20, 2001 and though this day, provided Applicant Manuel Gallegos with effective assistance of counsel in this case.

The decisions made by defense counsel were well thought out and appropriately implemented."

/s/ _____
Anthony Paul Calisi

SUBSCRIBED AND SWORN TO before me by the above named Affiant this 10TH day of December, 2003, to certify which my hand and seal of office.

[seal of notary]

/s/ Silvia Aranda _____
Notary Public in and for
The State of Texas

My Commission Expires: 12-02-06

APPENDIX F

WRIT NO. WOO-51576-U(A)
INDICTMENT NO. F00-51576-U

IN THE DISTRICT COURT 291st JUDICIAL COURT DALLAS COUNTY, TEXAS

[Dated February 2, 2004]

STATE OF TEXAS)
)
COUNTY OF DALLAS)
)

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Anthony P. Calisi, who after being duly sworn, upon oath said:

My name is Anthony P. Calisi, also known as "Ted" Calisi. I am an attorney duly licensed to practice law in the State of Texas, and have been so licensed since November 6th, 1978.

My law firm, Calisi & Associates, P.C., and I were retained to represent the Applicant, Manuel Gallegos, in the above-referenced and entitled cause. I have tried murder cases in the past, including, but not limited to, mass-murder (before it became a capital offense), capital murder and murder, as well as other first

degree felonies. Pursuant to my duties as Applicant's counsel, I used due diligence in the preparation for, and during the trial held in the 291st Criminal District Court, entitled The State of Texas v. Manuel Gallegos. The Applicant was indicted for, and was tried for Murder.

After a thorough review of all of the evidence secured by my office and co-counsel, Mr. Hugo Aguilar, including, but not limited to, the hiring of a licensed private investigator and also a forensic scientist, personal and numerous visits to the scene of the shootings, where a truckload of young men stopped several feet from me and raised their weapons as if to intimidate me, personal interviews with many prospective witnesses for the state and for the defense, visits with the Medical Examiner at her office, securing the clothing of the deceased for our forensic scientist's benefit, and a thorough review of the applicable law in this case, I am convinced I rendered effective assistance of counsel to the Applicant.

In providing effective assistance of counsel to Applicant and, at the trial of this cause, I presented only those witnesses(s) I believed to be credible. I would not allow then, nor have I ever allowed, any witness to testify if I had reason to believe their testimony would be perjured, if their testimony could not be verified as truthful and accurate, or if their criminal background would lead to impeachment, which would ultimately be detrimental to my client. In that regard, it was quite difficult to present witnesses for the defense, including even the brother of the Applicant.

Prior to the defense resting and closing, Applicant was consulted in English and in Spanish as to the plausibility of his testifying at his trial. My co-counsel and I both agreed, and so advised the Applicant of our decision not to present him as a witnesses during the guilt and innocence phase of the trial. We explained to him the danger of his testifying, especially because he had admitted to "shooting at" the deceased, and because of all the persons tested for gun powder residue, his hands were the only ones shown to have recently fired a weapon. Applicant agreed with our advice and did not testify. He never objected to his failure to testify until after his incarceration and preparation of his initial Writ.

Applicants request for relief because of his "actual innocence" uses as it's basis a statement from Martin Nunez which indicates that although Mr. Nunez did actually see Applicant fire two (2) shots in the air, that "neither shot hit Mr. Lopez". Inasmuch as the shootings occurred after 10:00 p.m. in the evening, and the deceased was not in close proximity to either the Applicant or Mr. Nunez, Mr. Nunez's statement lacks credibility. In addition, Applicant's brother, Marco Gallegos, was with Applicant during the shooting and thereafter when the Applicant and his brother Marco left the scene of the shooting together in the same vehicle. Thereafter, both Applicant and his brother Marco were subsequently arrested together at, or near the scene of the shootings. During my questioning of Marco Gallegos in preparation for trial he repeatedly asserted he never saw Applicant shoot at the deceased. During my questioning of Marco Gallegos he repeatedly stated that he "turned away" when the shots were fired. Yet, apparently after the trial, Marco

"came forward" and declared to persons other than myself that he actually did see Applicant fire his weapon at the deceased, proclaiming that neither of the two (2) shots fired by his brother, the Applicant, struck the deceased. Again, it was after 10:00 p.m., and neither Marco Gallegos nor Applicant were in close proximity to the deceased when Applicant fired the two (2) shots. If one were to now believe Marco, when he previously repeatedly told a falsehood to his own brother's attorney, and upon changing his story stated that he lied previously because he didn't want to "get involved," then one would have to permit such credibility to Marco Gallegos' statement as it deserves, especially as his own brother was being tried for Murder.

Affiant and his co-counsel, Mr. Hugo Aguilar, under very difficult circumstances, prepared and presented effective and thorough representation of, Applicant.

/s/_____
Anthony P. Calisi

SUBSCRIBED AND SWORN TO before me by the above-named Affiant on this the 2nd day of February, 2004 to certify which witness my hand and seal of office.

[seal of notary]

/s/ Silvia Aranda_____
SILVIA ARANDA
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires: 12-02-06